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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

PAUL DAVID LENABURG,

Defendant and Appellant.

E049168

(Super.Ct.No. SWF025852)

OPINION

APPEAL from the Superior Court of Riverside County. Eric G. Helgesen, Judge.
(Retired judge of the former Tulare Mun. Ct. assigned by the Chief Justice pursuant to
art. VI, § 6 of the Cal. Const.) Affirmed in part, reversed in part with directions.

Marcia R. Clark, under appointment by the Court of Appeal, for Defendant and
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Gary W. Schons, Assistant Attorney General, Rhonda Cartwright-
Ladendorf, and Susan Miller, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Paul David Lenaburg was convicted of willful, deliberate and premeditated attempted murder (Pen. Code, §§ 664/187, subd. (a)), possession of methamphetamine for sale (Health & Saf. Code, § 11378), and soliciting the commission of murder (Pen. Code, § 653f, subd. (b)). He contends only that the consecutive sentences imposed for soliciting the commission of murder and attempted murder violate Penal Code section 654. (All further statutory citations refer to the Penal Code.) We agree, and we reverse the judgment insofar as it imposes consecutive sentences on those counts, and remand with directions to stay imposition of sentence on count 3, solicitation of murder.

FACTS

Greg Bartole was a confidential informant supplying the Riverside County Sheriff's Department with information about drug dealers. In 2007, Bartole met defendant through another drug dealer. Defendant was selling high quality methamphetamine. Bartole developed a close relationship with defendant, speaking on the phone almost daily and meeting with him frequently. On the date of their first meeting, defendant told Bartole that he had access to a large cache of liquid ephedrine, a precursor of methamphetamine. Bartole relayed that information to Detective Holder at the Riverside Sheriff's Department. However, defendant's claim turned out to be "hot air." Defendant and Bartole agreed to become partners in manufacturing and selling methamphetamine. Bartole, who claimed to have expertise in the area, agreed to do the manufacturing, while defendant was to supply the liquid ephedrine.

In March 2008, defendant gave Bartole about a half gallon of the purported liquid ephedrine. (The liquid was not ephedrine. Bartole admitted on cross-examination that defendant actually told him it was “salt lick,” from which ephedrine might be extracted. Bartole did not know whether ephedrine could be extracted from it.) Bartole turned the liquid over to two Santa Ana detectives, at Detective Holder’s direction, to have the liquid analyzed. He told defendant that it would take about two weeks to “cook” it into methamphetamine.

During that two-week period, defendant told Bartole that he wanted to have someone killed and asked if Bartole could facilitate it. He identified the intended victim as Amber Jeffers, a drug dealer with whom he had gotten into a fight. Bartole told him that he could, but that it would cost \$50,000. Bartole reported the conversation to Detective Holder. Holder told him to pursue it, to see if he could get defendant to give him a down payment. Defendant balked at the price, and Bartole let defendant “beat [him] down” to \$20,000. However, defendant later called it off, saying he didn’t want to do it.

In mid-June, defendant said he had gotten into another fight with Jeffers and again wanted to have her killed. Bartole said he could make the arrangements and that the cost would be the same as before, i.e., \$20,000. Detective Holder arranged for Brian Sale, an undercover agent with the federal Drug Enforcement Agency (DEA), to pose as the hit man. He arranged for a location where the meeting could be audio- and videotaped.¹

¹ Both the audiotape and the videotape of the meeting were played for the jury.

Bartole told defendant that he had set up the meeting. For reasons having to do with a prior deal which went bad, Bartole agreed that defendant could use the methamphetamine Bartole said he had made using defendant's purported liquid ephedrine as a down payment on the hit, and told him that the hit man had agreed to accept it as the down payment. Defendant then met with Sale. Sale asked defendant what he wanted done to Jeffers. Defendant told Sale to do whatever he had to do, but made it clear that he wanted her killed. He said he wanted Jeffers's body to be found because he had provided bail for Jeffers and he wanted his \$250,000 back.

Sale and defendant retrieved the methamphetamine from defendant's car. Defendant then gave Sale detailed information about Jeffers and her activities so that Sale could locate her. He showed Sale a photograph on his cell phone of Jeffers's twin sister and told him that she looked just like Jeffers. Sale had previously seen a photograph of Jeffers, and he testified that the photo defendant showed him did look just like Jeffers.

After defendant provided him with the information necessary to find and identify Jeffers, Sale said, "[Y]ou know, I want you to understand, when I leave here, this is a done deal." Defendant replied, "This is a done deal. Absolutely." Sale said that once he left, there was no going back. Defendant replied, "Okay. Did you hear what I said? There is no going back. I don't go back. I'm a sixty year old guy and—when I say that, boom, it's done." Defendant was then arrested.

LEGAL ANALYSIS

SECTION 654 PROHIBITS IMPOSITION OF SENTENCE FOR BOTH SOLICITING THE COMMISSION OF MURDER AND ATTEMPTED MURDER

Over defendant's objection that imposition of sentence for the attempted murder and soliciting the commission of murder would violate section 654, the court imposed the mandatory term of life with the possibility of parole for attempted murder and imposed a consecutive term of nine years for solicitation.²

Section 654, subdivision (a), provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

Soliciting the commission of murder is committed when the defendant asks another person to commit the crime with the intent that the crime be committed. (§ 653f, subd. (b); *People v. Wilson* (2005) 36 Cal.4th 309, 328.) Attempted murder is committed when the defendant takes a direct but ineffectual step toward killing another person, with the intent to kill that person. (§ 21a; *People v. Lee* (2003) 31 Cal.4th 613, 623.) The crime of solicitation was complete when defendant asked Sale to kill Jeffers. The crime of attempted murder was committed when defendant took the additional step of paying

² The court also imposed a consecutive term on count 2, possession of methamphetamine for sale. The term imposed was one-third the middle term—eight months.

Sale to kill Jeffers, with the intent that the killing would result. The trial court determined that the two crimes were separately punishable because the attempted murder was committed by acts which went beyond the act necessary for solicitation, both the act of paying for the commission of the crime and the act of giving Sale information about Jeffers to enable him to find her. However, section 654's prohibition on multiple punishment is not limited to necessarily included or identical offenses or to cases in which a single act violates more than one penal statute. (*People v. Bauer* (1969) 1 Cal.3d 368, 375-376.) Rather, section 654 applies both to crimes flowing from a single act which violates more than one statute and to crimes resulting from an indivisible course of conduct. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) Consequently, the court's apparent conclusion that section 654 does not apply because the same acts did not constitute both crimes is erroneous as a matter of law. The issue is whether the two offenses are part of an indivisible course of conduct.

With respect to a course of conduct, "The test for determining whether section 654 prohibits multiple punishment has long been established: 'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.' [Citation.]" (*People v. Britt* (2004) 32 Cal.4th 944, 951-952.) On the other hand, if the defendant entertained multiple criminal objectives which were independent and not incidental to each other, he or she "may be punished for each

statutory violation committed in pursuit of each objective” even though the violations were part of a single incident or course of conduct. (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

Whether the defendant held multiple objectives for purposes of section 654 is a question of fact for the trial court, and a reviewing court must uphold the trial court’s finding if it is supported by substantial evidence. (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1466.) Here, the court did not expressly address that question. Even if we assume that such a finding is implicit in the court’s rejection of the defense argument that section 654 applies (see, e.g., *People v. Alford* (2010) 180 Cal.App.4th 1463, 1468), that finding is not supported by substantial evidence. On the contrary, the evidence supports only the conclusion that defendant entertained a single objective: to bring about Jeffers’s murder. Both the solicitation and the subsequent acts which constitute the attempted murder were means to the achievement of that ultimate objective. Consequently, this was an indivisible course of conduct, and although defendant was properly convicted of both crimes, he can be punished only once, for attempted murder. (*People v. Britt, supra*, 32 Cal.4th at pp. 951-954.)

The Attorney General argues that the evidence shows that defendant acted with two distinct intents: His “intent for the solicitation was to induce Sale to kill Jeffers, while his intent for the attempted murder was to kill Jeffers.”³ This assertion is probably

³ In the sentence immediately preceding this contention, the Attorney General states that defendant was *not* acting with multiple intents. We assume the use of the word “not” is an error.

correct, as far as it goes (but see *People v. Britt*, *supra*, 32 Cal.4th at p. 953, cautioning against “pars[ing] the objectives too finely” for purposes of section 654), but it nevertheless fails because even if the two crimes had different *immediate* objectives, both crimes were committed in furtherance of the ultimate objective of bringing about the murder of Jeffers.⁴

The Attorney General also attempts to analogize this case to *People v. Williams* (1988) 201 Cal.App.3d 439. In that case, the defendant burglarized the home of his parents-in-law and stole some jewels, with the intent to use the jewels to pay a hit man to kill the in-laws and their daughter. He waited several months before attempting to hire a hit man, and the court rejected the defendant’s section 654 argument because the crimes of burglary and solicitation were widely separated in time. (*Williams*, at pp. 441-442.) The court relied on *People v. Beamon* (1973) 8 Cal.3d 625, in which the court stated that “a course of conduct divisible in time, although directed to one objective, may give rise to multiple violations and punishment.” (*Id.* at p. 639, fn. 11.) This principle has no application in this case because defendant’s crimes were not separated in time. On the

⁴ The Attorney General does not appear to be arguing that defendant had the intent to kill Jeffers personally or that it was necessary that he had that intent. If that is what the Attorney General intended, we disagree. Attempted murder requires the intent to kill the victim, but it does not require the intent to do so personally. (If it did, defendant could not have been convicted of that offense on the facts of this case.) An attempted murder conviction can also be based on aiding and abetting, i.e., aiding or encouraging the direct perpetrator in the commission of the crime with the intent of committing or encouraging or facilitating the commission of the crime. (*People v. Lee*, *supra*, 31 Cal.4th at pp. 623-624.) Defendant’s intention for Jeffers to die at the hands of his paid accomplice supports the conviction on this basis, even though the jury was not instructed on aiding and abetting.

contrary, both occurred during the course of a single, uninterrupted conversation with the person defendant hired to carry out his objective of having Jeffers killed.

The abstract of judgment on the determinate-term offenses must be amended to reflect that the sentence on count 3, soliciting the commission of murder, is stayed pursuant to section 654. The sentence on count 2, possession of methamphetamine for sale, must be amended as well, to reflect the full consecutive middle term of two years.

**THE ABSTRACT OF JUDGMENT ON THE INDETERMINATE TERM FOR
ATTEMPTED MURDER MUST BE CORRECTED**

Section 664 provides that a person who is guilty of willful, deliberate and premeditated attempted murder “shall be punished by imprisonment in the state prison for life with the possibility of parole.” (§ 664, subd. (a).) Here, the trial court purported to impose a sentence of “seven years to life” on count 1, for attempted murder. It is correct that a person sentenced to life with the possibility of parole pursuant to section 664 becomes eligible for parole only after serving seven calendar years. (§ 3046, subd. (a).) That does not, however, mean that the sentence is “seven years to life.” There may be no practical distinction. However, sentence may be imposed only as authorized by law (*People v. Smith* (2001) 24 Cal.4th 849, 852), and the authorized sentence for premeditated attempted murder is life with the possibility of parole (§ 664, subd. (a)).

DISPOSITION

The judgment is reversed insofar as it imposes an unstayed sentence on count 3, for soliciting the commission of murder in violation of section 653f, subdivision (b). The judgment is otherwise affirmed.

The trial court is directed to issue an amended abstract of judgment on the determinate-term offenses, reflecting that the sentence on count 3 is stayed and imposing the middle term of two years on count 2 (possession of methamphetamine for sale), consecutive to the indeterminate term imposed on count 1. The abstract of judgment on the indeterminate-term offense (count 1, attempted murder) must also be corrected to reflect the sentence prescribed by law, i.e., life with the possibility of parole. The trial court is directed to forward certified copies of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

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/s/ McKinster
Acting P.J.

We concur:

/s/ King
J.

/s/ Miller
J.